No. 23-5409

In the

United States Court of Appeals

for the

Sixth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, and TENNESSEE CHAMBER OF COMMERCE & INDUSTRY,

Plaintiffs-Appellants,

– v. –

SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chairman of the Securities and Exchange Commission,

Defendants-Appellees.

On appeal from the United States District Court for the Middle District of Tennessee
Case No. 3:22-cv-00561

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

This case is a study in capricious agency action. Beginning in 2010, the Securities and Exchange Commission ("SEC") embarked on a decade-long bipartisan policymaking process, culminating in a compromise rule addressing long-recognized issues surrounding the role of proxy advisory firms (also known as proxy firms, proxy voting advice businesses, and PVABs) in the corporate governance process. *See generally Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) ("2020 Rule").

Shortly thereafter, however, a new SEC Chair took office—and under Chair Gary Gensler's leadership, the SEC immediately began to undermine and reverse this bipartisan compromise. The SEC unlawfully suspended the 2020 Rule via a series of coordinated actions in June 2021, and Chair Gensler then conducted closed-door meetings with opponents of the 2020 Rule as a prelude to formally rescinding it through an unduly abbreviated notice-and-comment process. *See generally Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022) ("2022 Rescission"). Critically, at no point during this truncated rulemaking did the SEC provide any legitimate justification for why the same

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation of this brief; and no person other than *amicus*, its members, or its counsel contributed money intended to fund the preparation of this brief.

factual record that previously supported the 2020 Rule now requires its rescission.

The Administrative Procedure Act ("APA") exists precisely to check such arbitrary and capricious governmental conduct. An agency cannot reverse course by simply disregarding earlier factual findings that contradict its new intended action—but that is just what the SEC has done here. Nor can it rely on reasoning that is irrational or disregard significant comments received during the notice-and-comment process or the views of dissenting Commissioners—but the SEC did not even attempt to respond to valid criticisms that undermined the fundamental premises on which the Commission purported to act. Finally, an agency cannot adopt or rescind a legislative rule without providing the public a *meaningful* opportunity for comment, and courts routinely vacate agency actions taken through truncated and predetermined comment processes like the one the SEC employed here.

The district court largely sidestepped this analysis, however, relying on the regulatory history of the 2020 Rule to excuse the agency's failings in promulgating the 2022 Rescission. But as Appellants explain, the APA is not evaded so easily. For all the reasons set out in Appellants' brief, and more, the 2022 Rescission must be set aside.

* * *

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million men and women, contributes $2.9 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Many of the NAM's members are publicly traded corporations. Indeed, 79% of Fortune 100 manufacturers are members of the NAM, as are 54% of Fortune 500 manufacturers. *See* National Association of Manufacturers, *About the NAM*, www.nam.org/about. Part of the NAM's mission, accordingly, is to advocate for rules that ensure accurate and transparent information is provided to these businesses and their shareholders in the context of annual shareholder meetings, at which critical decisions are made that impact the governance of public companies and the performance of their shareholders' investments. That is, the NAM's members have an interest in ensuring that, when third parties seek to provide advice as to how shareholders and their proxies vote on matters of corporate governance, the information provided is accurate and complete.

For this reason, the NAM devoted years of advocacy to a process that ultimately culminated in the 2020 Proxy Advice Rule, which is of the utmost concern to many of its members. *See, e.g.*, Comment of the National Association of Manufacturers, File No. S7-17-21, Proxy Voting Advice (Dec. 24, 2021), perma.cc/FT3P-JWFB; Comment of the National Association of Manufacturers, File No. S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (Feb. 3, 2020), perma.cc/CSA2-XEUN; File No. 4-725: *SEC Staff Roundtable on the Proxy Process*, Ltr. to Brent J. Fields (Mar. 5, 2019), perma.cc/S6QU-UDVS; *Meeting with National Association of Manufacturers*, File No. S7-22-19 (May 7, 2020), perma.cc/P3XC-8WZ6. The NAM has also litigated these issues on behalf of its members, including successfully challenging the SEC's unilateral and unlawful suspension of the 2020 Rule (*see Nat'l Ass'n of Mfrs. v. SEC*, __ F. Supp. 3d ___, 2022 WL 16727731 (W.D. Tex. 2022)) and challenging the procedure and substance of the SEC's rescission of that rule, a case that is proceeding in parallel to this one (*see Nat'l Ass'n of Mfrs. v. SEC*, No. 22-51069 (5th Cir.) (briefing completed; calendared for argument August 7, 2023)).

The NAM therefore submits this brief to emphasize and expand upon several specific points relevant to Appellants' challenge, in order to assist the Court in evaluating the critical failings of the SEC's rulemaking process.

ARGUMENT

I. The grave problems posed by proxy firms that animated the 2020 Rule have not abated.

As Appellants' brief describes, the 2020 Rule rescinded here was the product of over a decade of bipartisan policy deliberation, focused on addressing specific, verified problems caused by proxy firms' uniquely powerful and unregulated role in the corporate governance process. *See generally* Opening Br. 7-17.

Indeed, because of the ubiquity of proxy voting and the sheer number of votes that must be taken by institutional investors and large intermediaries, the SEC itself agrees that proxy advisory firms "have become uniquely situated in today's market to influence, and in many cases directly execute, these investors' voting decisions." 2020 Rule, 85 Fed. Reg. at 55,083. To put it more concretely, institutional investors controlling over *$5 trillion* in assets under management "voted in lockstep alignment with either ISS or Glass Lewis in 2020," with the result that these proxy firms' recommendations directed those institutions' votes on over 100,000 individual corporate resolutions that year. *See* Paul Rose, *Proxy Advisors & Market Power: A Review of Institutional Investor Robovoting* at 10-11 (Apr. 2021), perma.cc/U2HV-DMRN. As the SEC has recognized, ensuring "the transparency, accuracy, and completeness of the information provided to clients of proxy voting advice businesses in connection with their voting decisions" is therefore critical. 2020 Rule, 85 Fed. Reg. at 55,083.

Concerns have been growing for years, however, that proxy firms have *not* been providing "transparen[t], accura[te], and complete[]" information to their clients. 2020 Rule, 85 Fed. Reg. at 55,083. Indeed, a survey by the NAM found that nearly 78% of public company respondents were concerned about the actions of proxy advisory firms, and 56% of them found that they were having to divert resources from their core business functions in order to respond to the actions of proxy advisory firms. *See NAM Manufacturers' Outlook Survey, Fourth Quarter 2018* at 8, 13 (Dec. 20, 2018), perma.cc/9CNE-HSYU. In a separate NAM survey, 77% of publicly traded manufacturers expressed concerns that the environmental, social, and governance ("ESG") agendas of proxy firms and other third parties would increase costs for companies and divert resources from long-term value creation. *See NAM Manufacturers' Outlook Survey, Fourth Quarter 2012* at 3 (Jan 4, 2023), perma.cc/HA9X-STXW.

Similarly, data from 2016, 2017, and 2018 show that proxy advisory firms' reports on nearly one hundred companies included numerous factual and analytical errors. Frank M. Placenti, *Analysis of Proxy Advisor Factual and Analytical Errors in 2016, 2017, and 2018* (2018), perma.cc/RGR3-YR6X. And a 2019 survey by the Society for Corporate Governance found that 42%

of corporate respondents had been subject to factual or analytical errors or omissions by proxy firms in the preceding three years, and catalogued dozens of specific examples of such errors. *See* Comment of the Society for Corporate Governance at 4-7 & appx. A, File No. S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (Feb. 3, 2020), perma.cc/6FNL-L848.[2]

The 2020 Rule was a targeted, compromise solution addressed at precisely these problems. Indeed, the agency adopted the 2020 Rule explicitly on the basis of widespread "concerns . . . focused on the accuracy and soundness of the information and methodologies used to formulate proxy voting advice businesses' recommendations" and the resulting "risk of proxy voting advice businesses providing inaccurate or incomplete voting advice . . . that could be

[2] The NAM has taken a leading role in engaging with the SEC on these issues. *See, e.g.*, Comment of the National Association of Manufacturers at 2-3, File No. 4-725, SEC Staff Roundtable on the Proxy Process (Oct. 30, 2018) (explaining, as part of the 2018 roundtable, that while "the NAM believes that proxy firms can be constructive and provide a useful service" under the correct conditions, "the flaws embedded into the business model of proxy advisory firms are at this point well-documented, and manufacturers have time and time again faced significant costs due to their influence"), perma.cc/G6SR-YE9Z, *id.* at 2-3 (discussing the "notable lack of transparency" surrounding "the process by which proxy firm recommendations are developed"; proxy firms' "profusion of errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company's peer group or compensation practices"; and the fact that "[p]roxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct these errors," among other problems).

relied on to the detriment of investors." *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518, 66,520 (Dec. 4, 2019) ("2019 Proposed Rule"); *see also id.* ("In light of these concerns, we are proposing amendments to the federal proxy rules that are designed to enhance the accuracy, transparency of process, and material completeness of the information provided to clients of proxy voting advice businesses when they cast their votes."); 2020 Rule, 85 Fed. Reg. at 55,082 (adopting final 2020 Rule "so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions."). And yet, the SEC has now jettisoned that common-sense and light-touch regulatory approach, with barely a fig leaf of purported justification.

To be crystal clear: Nothing material changed about the dangers posed by proxy advisory firms in the months between the finalization of the 2020 Rule and the SEC's decision to rescind it. To the contrary, as Appellants explain (at 45), the only feature of the proxy-firm market that differs from before the 2020 Rule is that the largest such firm, ISS, now provides *less* engagement and transparency to the public companies on which it reports. *See also*, *e.g.*, Commissioner Hester M. Peirce, *U-Turn: Comments on Proxy Voting Advice* (July 13, 2022) ("Peirce 2022 Dissent"), perma.cc/7BMX-GMA7 (explaining that "[w]hen the Commission proposed these latest amendments nine months ago . . . nothing had changed since we adopted our 2020 Rules to justify repeal, so I voted no. The feedback we received during this proposal's brief comment period confirmed my initial view.").

Indeed, Commissioner Peirce put it bluntly in dissenting from the proposal to rescind the 2020 Rule: "Nothing has changed since we adopted the rule, and we have not learned anything new. The release takes a stab at justifying the rewrite, but we might as well simply acknowledge that the political winds have shifted." Commissioner Hester M. Peirce, *Dissenting Statement on Proxy Voting Advice Proposal* (Nov. 17, 2021) ("Peirce 2021 Dissent"), perma.cc/PV7X-Z27G; *see also id.* ("I appreciate the staff's efforts to make this a coherent proposal. You did the best you could since nothing has changed and we have not received any new information to warrant a new rulemaking. I simply cannot pretend that this is a normal course of action for the Commission.").

What is more, the lack of new information was the SEC's own invention: The agency unlawfully prevented the 2020 Rule from ever going into effect, meaning that its effects could not be evaluated in the normal course of policymaking. *Cf.* Peirce 2021 Dissent, *supra* ("A more reasonable approach would be to commit to a retrospective review of the 2020 Final Rules after three or five years to evaluate their effectiveness."); *see generally Nat'l Ass'n of Mfrs.*, 2022 WL 16727731, at *1-5 (holding that the SEC's unilateral suspension of the 2020 Rule was unlawful for lack of notice-and-comment rule-making).

More recent studies confirm that the problems that animated the SEC's decade-long bipartisan policymaking process, ultimately culminating in the 2020 Rule, have not spontaneously disappeared. Indeed, a December 2021 analysis identified 50 instances in 2021 alone in which public companies filed supplemental proxy materials to correct a proxy firm's analysis, a 21% *increase* over the year before. American Council for Capital Formation, *Proxy Advisors Are Still a Problem* at 9 (Dec. 2021), perma.cc/C55R-39ZX.

As the NAM pointed out in its comment on the proposed rescission, there remains "widespread support" for the 2020 Rule—and indeed, for the more robust regulation of proxy firms, including some provisions of the 2019 Proposed Rule that were not finalized—even as the SEC has rescinded the 2020 Rule without adequate justification. Comment of the National Association of Manufacturers at 12, File No. S7-17-21, Proxy Voting Advice (Dec. 24, 2021) ("2021 NAM Comment"), perma.cc/FT3P-JWFB ("As discussed, the NAM and many other stakeholders continue to support an issuer engagement framework aligned with the 2019 proposal's requirements, if not more robust. However, these views are not reflected in the proposing release, nor is the widespread support for the 2020 rule's compromise solution."); *see also* Peirce 2022 Dissent, *supra* (noting that "the weight of the comments received over the past few months favor[ed] the Commission leaving intact its 2020 work"). Thus, contrary to the ostrich approach to regulation pursued by the SEC here, proxy advisory firms are still just as much of a problem as they were in 2020—if anything, they are more so.

II. The SEC's abrupt reversal of prior policy is arbitrary and capricious.

Turning to the merits, the SEC's action here is substantively arbitrary and capricious, and must therefore be set aside. *See* Opening Br. 42-54.

A. First, the rescission of the issuer-engagement provisions—that is, the 2020 Rule's requirements that proxy firms timely make their analyses available to the subject companies, and provide a means for their clients to become aware of those companies' responses—is arbitrary and capricious for failure to adequately explain the agency's 180-degree turn. As the Supreme Court has explained, when an agency reverses course, it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" if the "new policy rests upon factual findings that contradict those which underlay [the agency's] prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In other words, "it's legally required for a decision predicated on contradicting prior agency findings" to "address [those] prior factual findings—explaining why they were mistaken, misguided, or the like." *Texas v. Biden*, 20 F.4th 928, 991 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528

(2022); *see also, e.g.*, *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021) (similarly setting aside agency action for a *Fox* violation).

The SEC has failed to satisfy that obligation here. As noted above, the agency's principal basis for rescinding the 2020 Rule's issuer-engagement provisions was that "many investors and [proxy advisory firm] clients have continued to warn, both in response to the adoption of the 2020 [Rule] and again in comments on the 2021 [Proposed Rescission], that the Rule 14a-2(b)(9)(ii) [issuer-engagement] conditions risk impairing the independence and timeliness of proxy voting advice and imposing increased compliance costs on [proxy firms], without corresponding investor protection benefits." 2022 Rescission, 87 Fed. Reg. at 43,175 (emphasis added); *see also id.* At 43,175 ("[W]e agree that the risks posed by the Rule 14a-2(b)(9)(ii) conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now.").

As the quoted text acknowledges, however, these "concerns" were not new. Rather, they were "reiterated" from "the prior rulemaking process"—that is, the adoption of the 2020 Rule itself. Peirce 2022 Dissent, *supra*. And when presented with those same arguments in the earlier rulemaking—that is, that the issuer-engagement provisions would have negative effects on "independence and timeliness" of proxy advice—the agency *flatly rejected them*:

> Because [the 2020 Rule] does not require proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, the rule ***does not create the risk that such advice would be delayed or that the independence thereof would be tainted*** as a result of a registrant's pre-dissemination involvement.

2020 Rule, 85 Fed. Reg. at 55,112 (emphasis added).

That explicit finding that the 2020 Rule's issuer-engagement provisions "do[] not create . . . risk" to the independence or timeliness of proxy advice (2020 Rule, 85 Fed. Reg. at 55,112) is unmistakably and irreconcilably contradicted by the 2022 Rescission's "*agree[ment]* that the risks posed by the [issuer-engagement] conditions to the cost, timeliness, and independence of proxy voting advice" justify rescinding those provisions (2022 Rescission, 87 Fed. Reg. at 43,175 (emphasis added)). As the Fifth Circuit has explained, "[t]hat triggers the arbitrary-and-capricious rule set forth in *Fox*." *Texas*, 20 F.4th at 991. "Yet," as in *Texas*, "[the SEC] failed to give a 'detailed' (or *any*) discussion of the prior findings." *Id.* As the Fifth Circuit put it, under *Fox*, "[t]hat's that"—the unexplained change in position is arbitrary and capricious. *Id.*; *see also Wages & White Lion*, 16 F.4th at 1139 (agency about-face was arbitrary and capricious where the agency "turned around and ignored its prior" findings and reasoning). This fundamental failing is therefore fatal to the SEC's action here.

The district court rejected this straightforward reasoning, positing that because the quoted text from the 2020 Rule referenced a lack of harm to timing or independence specifically from "pre-dissemination involvement" (2020 Rule, 85 Fed. Reg. at 55,112), it was "misleading" to suggest that the SEC in 2020 found "that notice-and-awareness posed no risks whatsoever of causing delays or compromising independence for any reason," and that proposition "accordingly[] [was] not something that the SEC needed to repudiate" (Opinion at 34, PageID# 2041). Contrary to this surface-level analysis, however, the *totality* of the 2020 Rule—not merely one pull quote—makes it abundantly clear that the agency viewed the 2020 Rule as eliminating any meaningful risk to the timeliness or independence of voting advice.

That is, as the 2020 Rule explains, "*because* the [2020 Rule] does not include a registrant review and feedback process that requires pre-publication review, it . . . *should not* discourage proxy voting advice business from making recommendations that oppose management or impose additional timing constraints on proxy voting advice businesses." 2020 Rule, 85 Fed. Reg. at 55,139 (emphases added). In other words, the elimination of advance review from the 2019 proposal eliminated any risk to timing or independence from the Rule as a whole, because there is *no other feature of the Rule* that could plausibly create such risks.[3] Indeed, as Appellants point out, *nowhere* in the 2022 Rescission does the SEC actually explain *why* the 2020 Rule as adopted (without pre-publication review) would endanger timeliness or independence. Opening Br. 49-50, 54; *see also* Reply Br. 10-20, *Nat'l Ass'n of Mfrs. v. SEC*, No. 22-51069 (5th Cir. Mar. 13, 2023), Dkt. 90 (rebutting SEC counsel's attempt to locate such an explanation in the text of the rescission).

B. Furthermore, Appellants ably explain why the two claims advanced by the SEC in support of its action—alleged "concerns" about the 2020 Rule's effect on "independence and timeliness of proxy voting advice" (2022 Rescission, 87 Fed. Reg. at 43,175), and the existence of certain voluntary compliance measures by proxy firms (*id.* at 43,176)—are irrational, unsupported by the evidence, and legally insufficient under the APA to justify the rescission of the 2020 Rule. *See generally* Opening Br. 46-54. The NAM agrees with this analysis and will not repeat it here. *See* Pls. Mot. For S.J. at 13-18, *Nat'l Ass'n of Mfrs. V. SEC*, No. 22-cv-163 (W.D. Tex.), Dkt. 15 (explaining in similar terms, in the NAM's parallel challenge to the 2020 Rule's rescission, why

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[3] *See also* 2020 Rule, 85 Fed. Reg. at 55,112 ("By adopting this approach, as discussed above, *we believe we have addressed* the concerns raised by commenters … including those related to timing and the risk of affecting the independence of the advice.") (emphasis added); *id.* at 55,138-55,139 ("[W]e believe the final amendments will *substantially address, if not eliminate altogether*, the concerns raised by commenters related to objectivity and timing pressure associated with the proposed engagement process.") (emphasis added).

"[t]he stated justifications for the 2022 Rescission are irrational" given that "[i]t is implausible that a [proxy firm]'s ability to publish independent, unbiased voting advice could be impacted by a requirement that it send its voting recommendations to businesses *after they are finalized*" and that "voluntary measures by some proxy firms" cannot "obviate[] the need for regulatory actions necessary to protect issuers").

Rather, we write separately to emphasize that these gaps in the SEC's reasoning should come as no surprise to the agency, as each of them was brought to the SEC's attention through the comment process—albeit an unlawful one—that led to the 2022 Rescission. And because the SEC failed to consider and respond to these important comments, the agency's action must be set aside for this reason, too. *See, e.g.*, *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (agency "must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision") (quotation marks omitted)); *accord Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*, 28 F.4th 700, 714 (6th Cir. 2022) (same) (quoting *Carlson*, 938 F.3d at 344). As one dissenting Commissioner put it: "We are forging ahead to adopt this recommendation as proposed—as if we had never heard commenters' concerns about the redo. In essence, the Commission, having pre-populated its voting card nine months ago, did not have much interest in the responses we received during the unnecessarily short comment period." Peirce 2022 Dissent, *supra*.

First, the agency was not unaware that the central basis of for the rescission—the notion of protecting against "risks . . . to the . . . timeliness[] and independence of proxy voting advice" (2022 Rescission, 87 Fed. Reg. at 43,170)—simply had no application to the simultaneous-disclosure version of issuer engagement adopted by the 2020 Rule, as opposed to the more fulsome pre-publication engagement contemplated by the 2019 Proposed Rule. As the NAM explained to the agency in its comment letter:

> [T]he concerns raised about the timeliness and independence of proxy voting advice are simply not credible. The 2020 rule's issuer engagement provisions provide significant flexibility to PVABs and require exactly zero action on their part before a recommendation is finalized. ***It is implausible that a PVAB's ability to publish independent, unbiased voting advice could be impacted by a requirement that it send its voting recommendations to businesses after they are finalized.*** The NAM believed that even the 2019 proposal's more stringent requirements related to PVABs' draft recommendations were extremely unlikely to impact the firms' independence; it is not believable that the 2020 compromise solution would have any impact whatsoever on the independence of PVABs or their voting recommendations.

2021 NAM Comment at 12 (emphasis altered); *see also* Comment of Natural Gas Services Group at 5, File No. S7-17-21, Proxy Voting Advice (Dec. 27, 2021) ("[I]t is erroneous to suggest that the simple act of providing a copy of a report to the subject of such report and making the subject's response available to clients will impair the independence and objectivity of the proxy advisory firm.") ("2021 NGS Comment"), perma.cc/5HZS-GLJN.

But rather than respond to these comments—which attacked the key basis for the agency's decision to rescind—by explaining *why* the agency believed such a light-touch regulation posed timeliness and independence concerns, the SEC simply "acknowledge[d]" the existence of hostile comments and failed entirely to respond to their content. 2022 Rescission, 87 Fed. Reg. at 43,174. That is arbitrary and capricious. *Carlson*, 938 F.3d at 346 ("These public comments called into question the justifications offered by the [agency], and therefore [it] should have evaluated" the comments' merits); *see also, e.g.*, *Centro Legal de la Raza v. Exec. Office for Immigration Rev.*, 524 F. Supp. 3d 919, 958 (N.D. Cal. 2021) ("An agency . . . cannot simply '[n]od[] to concerns raised by commenters only to dismiss them in a conclusory manner.'") (quoting *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020)).

Commenters similarly pointed out flaws in the agency's second pillar of reasoning, including the false notion that, factually, proxy advisory firms (particularly ISS, the market leader) are open to meaningful engagement with issuers that could approximate the 2020 Rule's issuer-engagement provisions. For example: "[A]s the NAM has consistently explained, ISS—and other proxy firms—consistently choose *not* to engage with issuers, highlighting the ineffectiveness of voluntary measures." 2021 NAM Comment at 13;

see also 2021 NGS Comment 3-4; Comment of Nasdaq, Inc. at 4-5, File No. S7-17-21, Proxy Voting Advice (Dec. 27, 2021) (relaying examples of companies' "frustrations" with ISS and Glass Lewis's lack of engagement, and "conclud[ing] from these representative issuer experiences that the status quo"—that is, lack of a regulatory mandate for engagement—"has been ineffective"), perma.cc/5FY3-V84X.

Again, the SEC failed to address these comments, which pointed out that the agency's reasoning was built on a factually false foundation, on the merits, instead simply repeating the notion that "PVABs already are incentivized to engage with registrants regarding their proxy voting advice." 2022 Rescission, 87 Fed. Reg. at 43,176. This failure to engage and respond constitutes arbitrary and capricious behavior under the APA.

Moreover, a multi-member Commission like the SEC is required to respond not only to significant public comments, but also to the views of dissenting Commissioners. *See, e.g.*, *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010) ("[W]hile FERC is not required to agree with arguments raised by a dissenting Commissioner, it must, at a minimum, acknowledge and consider them.") (citing, *inter alia*, *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005)). Commissioner Peirce's dissent "identified serious flaws in the Commission's stated rationale," particularly with respect to proxy firms' incentives to engage with issuers and the sufficiency of the industry's voluntary measures. Peirce 2022 Dissent, *supra*. And as discussed in further detail below, Commissioner Uyeda's dissent explained that, "[p]rocedurally, the 30-day comment period for the proposal was insufficient under the circumstances." Commissioner Mark T. Uyeda, *Statement on Final Rule Amendments on Proxy Voting Advice* (July 13, 2022) ("Uyeda Dissent"), perma.cc/TS3H-FH6K; *see* pages 22-23, *infra*. Yet the Commission responded to neither. For this reason, too, the 2022 Rescission is arbitrary and capricious. *Am. Gas Ass'n*, 593 F.3d at 21 (vacating and remanding because "the Commission must [act] in a reasoned decision that acknowledges the concerns raised by the dissenting Commissioner.").

III. The SEC failed to provide a meaningful opportunity for comment.

Finally, as Appellants' brief demonstrates, the rescission of the 2020 Rule must also be set aside under voluminous case law holding that comment periods of similar duration to that employed by the SEC here are insufficient to supply the "meaningful opportunity" for public participation demanded by the APA. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *see* Opening Br. 31-41 (citing, *inter alia*, *Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 819-821 (N.D. Cal. 2020) (30-day comment period unlawful); *Becerra v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1176-1177 (N.D. Cal. 2019) (30-day comment period unlawful); *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *3

(D.D.C. Apr. 4, 2021) (30-day comment period unlawful); *Centro Legal*, 524 F. Supp. 3d at 954-955 (30-day comment period unlawful)).

Under these and other authorities, the length of the truncated comment period here strongly indicates that the SEC's procedures were inadequate. "While the APA is silent as to what constitutes sufficient time to comment," a 60-day comment period is standard,[4] and the D.C. Circuit "recently described 30 days as 'generally the *shortest* time period for interested persons to meaningfully review a proposed rule and provide informed comment.'" *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 (quoting *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019)) (emphasis added); *cf. Petry v. Block*, 737 F.2d 1193, 1202 (D.C. Cir. 1984) (30-day timeline "cut the comment period to the bone").

Here, the SEC's proposal to rescind the 2020 Rule was published in the Federal Register on November 26, 2021—the day after Thanksgiving—and allowed comments only until December 27, 2021, thirty-one days later. *See Proxy Voting Advice*, 86 Fed. Reg. 67,383, 67,383 (Nov. 26, 2021) ("2021 Pro-

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[4] *See, e.g.*, *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 ("[B]ecause 30 days is ordinarily seen as the minimally acceptable period, two Executive Orders state that agencies should 'generally' or 'in most cases' provide 'at least 60 days' for comments.") (citing Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011)); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)). The Administrative Conference of the United States also recommends a 60-day comment period for significant regulations. *See* Admin. Conf. of U.S., *Rulemaking Comments* (June 16, 2011), perma.cc/Q97Q-UNLN.

posed Rescission"). Not only was this period only a single day longer than the "shortest," "minimally acceptable" or "cut . . . to the bone" comment period generally permissible, but it was functionally even shorter, as it included the Christmas and Hanukkah holidays and set the comment deadline during the week between Christmas and New Year's Day, when "many businesses may close entirely." *Pangea*, 501 F. Supp. 3d at 819 n.24.

What is more, this timing placed the comment period during the end-of-fiscal-year rush for many public companies, one of the main constituencies that supported the 2020 Rule. Courts have not hesitated to find similarly shortened and inconveniently timed comment periods unlawful. *See Pangea*, 501 F. Supp. 3d at 819-820 (30-day comment period insufficient when it "spanned the year-end holidays"); *Centro Legal*, 524 F. Supp. 3d at 954-955 & n.26 (30-day comment period that "included Labor Day, a federal holiday, . . . and overlapped with the comment periods for" related rules unlawful).

Indeed, even one of the SEC's own Commissioners came to the same conclusion, stating flatly that "the 30-day comment period for the proposal was insufficient under the circumstances," given that the "period overlapped with major holidays, including Thanksgiving, Christmas, Hanukkah, and the beginning of Kwanzaa"; "the comment deadline fell during the first holiday season since the rollout of COVID vaccines, which allowed families to gather in person safely for the first time in nearly two years"; and the deadline "came at a time when many public companies with calendar year-end fiscal years were in the midst of preparing and auditing their financial statements." Uyeda Dissent, *supra*; *accord* Peirce 2022 Dissent, *supra* ("comment period" was "unnecessarily short"). That stark conclusion, from inside the Commission itself, is telling.

By contrast, the SEC gave no reason whatsoever for the shortened period. *See, e.g.*, *Centro Legal*, 524 F. Supp. 3d at 955 (finding 30-day period insufficient in part because the agency "did not identify any exigent circumstances requiring a compressed comment period"); *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 ("[I]t is troubling that defendants failed to abide by these [60-day] guidelines or explain their departure from them."). Nor could it have: The agency had already (unlawfully) suspended enforcement of the 2020 Rule while it contemplated regulatory changes, so there was simply no urgency that could have justified rescinding the rule via an irregular and shortened comment procedure.

Further highlighting the irregularity of the SEC's action here, Chair Gensler himself has stated in congressional testimony that the SEC would "always" set the comment deadline "the later of" 60 days from the SEC's vote or one month from Federal Register publication—but the agency inexplicably did not do so when rescinding the 2020 Rule. House Appropriations Committee, *Fiscal Year 2023 Budget Request for the Federal Trade Commission and* *the Securities and Exchange Commission* (May 18, 2022), perma.cc/UM6V-PUDR (video at 54:53-55:50); *see* Letter from Sens. Hagerty & Tillis to Chair Gensler (July 12, 2022) (criticizing the shortened procedure here in light of this inconsistency), perma.cc/7WT2-HMWT.

Finally, "[i]n cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as [] well as the number of comments received during that time-period." *Becerra*, 381 F. Supp. 3d at 1177 (citing *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012)). Both factors indicate that the comment period here was insufficient. When it proposed adopting the 2020 Rule, the SEC allowed 61 days for public comment. *See* 2019 Proposed Rule, 84 Fed. Reg. at 66,518. Yet in rescinding that same rule, the agency truncated the comment period to only 31 days—again, without explanation. What is more, the rescission garnered less than *one tenth* of the comments received during the rulemaking that led to the adoption of the 2020 Rule. *Compare* SEC, *Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, File No. S7-22-19 (667 comments on 2019 Proposed Rule), perma.cc/29HH-26TS, *with* SEC, *Comments on Proposed Rule: Proxy Voting Advice*, File No. S7-17-21 (61 comments on 2021 Proposed Rescission), perma.cc/MB78-6CKQ.

It appears that—as was fully predictable—many entities and individuals concerned with these issues were unable to submit comment letters on a compressed timeframe, over the holidays. Thus, "the number of comments received on the [2022 Rescission] also shows the comment period was inadequate." *Pangea*, 501 F. Supp. 3d at 820; *see also, e.g.*, *N.C. Growers' Ass'n*, 702 F.3d at 770 (finding that similar order-of-magnitude discrepancy in comments received indicated that shortened period was insufficient).

The district court was correct to find all of the above "troubling" (Opinion at 21, PageID# 2028)—but was wrong to dismiss those concerns. As Appellants point out—and contrary to the thrust of the district court's reasoning—the deliberative process that led up to the 2020 Rule cannot stand in for the lack of a meaningful comment opportunity in rescinding that rule. Not only would that be an illogical proposition as a general matter, but also here the public *never* had a full opportunity to comment on the merits of the issuer-engagement provisions adopted in the 2020 Rule, because the 2019 proposal that led to that rule involved a materially stronger version of issuer engagement that *did* require pre-dissemination review of proxy advice by public companies. *See* Opening Br. 40. So the *only* opportunity the public had to comment on the simultaneous-disclosure version of issuer engagement adopted in the 2020 Rule was the inexplicably foreshortened comment period between Thanksgiving and Christmas 2021. As Appellants explain, that period was insufficient. The Rescission must be set aside for this reason, too.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court with instructions to vacate the rescission of the 2020 Rule.

Respectfully submitted,

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Dated: June 27, 2023

CERTIFICATE OF SERVICE

I certify that that on June 27, 2023, I caused the foregoing brief to be served electronically on all parties via the Court's CM/ECF system.

Dated: June 27, 2023 /s/ *Paul W. Hughes*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *amicus* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 5,972 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 27, 2023 /s/ *Paul W. Hughes*